

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below.



/S/ RUSS KENDIG

Russ Kendig
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CHAPTER 13
)	
SCOTT WARD CLEMSON AND)	CASE NO. 06-62643
ANN MARIE CLEMSON,)	
)	JUDGE RUSS KENDIG
Debtors.)	
)	
)	MEMORANDUM OF OPINION
)	(NOT INTENDED FOR
)	PUBLICATION)

Chapter 13 trustee Toby L. Rosen ("Trustee") submitted a proposed modification of Debtors' plan on April 28, 2010. The trustee asserts that Debtors' income increased in 2009 and payments to the plan should be increased accordingly. Debtors objected to the modification. Several hearings were held on the issue, with a final hearing conducted on November 3, 2010. The parties submitted briefs in support of their positions.

Jurisdiction is premised in 28 U.S.C. § 1334 and the general order of reference entered in this district on July 16, 1984. In accordance with 28 U.S.C. § 1409, venue in this district and division is proper. The following Memorandum of Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

This opinion is not intended for publication or citation. The availability of this opinion, in electronic or printed form, is not the result of a direct submission by the court.

BACKGROUND

Debtors filed a joint chapter 13 case on December 21, 2006. At that time, both debtors were employed, with above-median gross annual earnings of approximately \$90,948.00. Their monthly net income was \$5,552.00. They have two school-aged children. Debtors were purchasing their home and were current on the mortgage payments. Their monthly expenses, taken from Schedule J, totaled \$4,927.00.

Debtors' plan was confirmed on May 1, 2007. The plan provided an estimated dividend of 35% to unsecured creditors. Payments were \$735.00 per month for a sixty month commitment period.

Trustee modified the plan after receiving a copy of Debtors' 2009 federal income tax return. The return shows Debtors had an adjusted gross income of \$117,605.00 in 2009, nearly \$27,000.00 more than when the case was filed. The trustee wanted the plan payments increased to \$1,440.00 per month.

At some point in late 2008 or early 2009, Mr. Clemson obtained new employment in the D.C. area making \$3,200.00 gross biweekly. The debtors moved from Ohio with the hopes that Mrs. Clemson could find new employment, too. They rented a house, intending to surrender their Ohio residence. Mrs. Clemson could not find work and, with the higher cost of living and only one salary, Debtors returned to Ohio. Upon their return, Mr. Clemson returned to his previous employment and Mrs. Clemson obtained new employment. On September 3, 2010, Debtors filed amended Schedules I and J. According to the amended I, Debtors' annual gross income is \$100,140.00. Their monthly net income is \$6,567.00.

Debtors now itemize expenses of \$5,832.00. Trustee argues that the budget is excessive and Debtors' disposable income is \$1,383.00. Debtors object.

LAW AND ANALYSIS

According to Debtors' amended Schedule I, Debtors now make \$1,015.00¹ more per month than when they filed this case. Trustee wants \$648.00² of this to be paid in to the plan. Debtors object and essentially argue that their expenses have increased, since filing, \$905.00 per month. They want to keep the entire benefit of their increased

¹ The net income on the original Schedule I was \$5,552.00; the amended Schedule I shows monthly net earnings of \$6,567.00, for a difference of \$1,015.00.

² Trustee wants \$1,383.00 and Debtors' current plan payment is \$735.00, for a difference of \$648.00.

earnings for themselves, without any return to their prepetition creditors.³

Modifications of plans are authorized by 11 U.S.C. § 1329. As the party seeking modification, the trustee bears the burden of proof. See Max Recovery, Inc. v. Than (In re Than), 215 B.R. 430 (B.A.P. 9th Cir. 1997); In re Wetzel, 381 B.R. 248 (Bankr. E.D. Wis. 2008). The dispute centers on the reasonableness of Debtors' new budget in light of their increased income.

The trustee challenges, to some extent, both income and expenses. A review of Trustee's brief indicates that she did not have the benefit of all of the evidence now before the court, including multiple pay stubs and utility bills. For this reason, the court will review both income and expenses, starting with income. The court uses the averages from the pay stubs provided by Debtors with their brief filed on December 15, 2010. Mr. Clemson earns \$5,000.00 per month gross. After an average monthly deduction of \$1,055.00 for taxes and mandatory payroll deductions, his net earnings are \$3,945.00. Mrs. Clemson's monthly gross earnings are \$3,383.00 per month. Her deductions total \$904.00 per month, which includes taxes and applicable payroll deductions (\$363.00), health insurance premiums (\$135.00), retirement contributions (\$338.00), and a monthly deduction of \$68.00 for LEA.⁴ Consequently, her monthly net income is \$2,479.00. Debtors combined monthly net income is \$6,424.00, slightly less than listed on Debtors' amended Schedule I.

Next, the court will determine the reasonableness of Debtors' expenses. Trustee's position is that the expenses are inflated. She first takes aim with the utility expenses, finding heating and electric expenses totaling \$380.00 is high and randomly asserts that half this figure is reasonable. Debtors attached various utility bills to their brief. Three electric bills are included, which average \$170.00 per month. Although the court notes that these bills include the tail end of the summer, when usage was likely at its peak because of air conditioning, the bills establish a three month, atypical average of \$170.00.

Debtors also attached three gas bills for home heat. Debtors' current budget is \$180.00 per month. An overpayment credit exists on the account, which has been carried for at least four months, and the court finds the budget figure is not an accurate representation of average monthly usage. The average of the three bills is \$104.00, which the court finds is a more reasonable representation of actual heating expenses. The court also notes that the last bill, dated November 30, 2010, states that Debtors annual use was 58.4 MCF units. Over the course of a year, this breaks down to approximately 5 MCF units per month. The \$104.00 average represents approximately 7.7 MCF units per month, which is in excess of Debtors' average monthly use over the course of the past year. The court finds the \$104.00 figure reasonable. Trustee's position that the heating

³ Debtors scheduled just under \$105,000.00 in unsecured debt when the case was filed. Approximately \$95,000.00 of this was credit card debt.

⁴ Trustee suggests this amount is for union dues. The expense is not challenged.

and utility expenses are inflated is supported by Debtors' exhibits, but not as inflated as suggested by Trustee. The total should be \$274.00 per month, not \$380.00.⁵

Debtors also attached two bills for water and three bills for sewer service. The average water bill is \$48.00; the average sewer bill is \$22.00, for a total of \$70.00. The total on Schedule J for these expenses is \$106.00, or \$36.00 more than supported by Debtors' attachments. Similarly, Debtors attached Massillon Cable TV bills for "Cable/Phone/Mega/DVR pack" services totaling \$123.95 per month, or \$11.00 less than Schedule J. Debtors' trash service, which is not on Schedule I, averages \$20.00 per month. Debtors also attach evidence of their monthly newspaper service. This is not a utility, but in the nature of a recreational expense.

Debtors' monthly cell phone bills average \$212.00 per month. Debtors scheduled the expense at \$150.00 per month on the amended Schedule I. It is apparent that Debtors' expenditures on the cell phone exceed even their own estimations. Cell phone usage totaling \$212.00 per month is patently unreasonable for these debtors. Even \$150.00 seems excessive, but this figure was not challenged by Trustee on the original expense itemization and the court will allow the expense to stand.

Debtors admit that union dues are deducted from Mrs. Clemson's pay and therefore should not also be included on Schedule J. This means \$50.00 more is available for the plan payment.

When the case was filed, Debtors itemized \$1,150.00 in general household expenses, including groceries/food, clothing, laundry/dry cleaning, recreation, and school lunches. Now, the figures for these same expenses total \$1,490.00, plus Debtors add a miscellaneous category of \$200.00 for unspecified children's expenses. These increases are in addition to the following increases not otherwise mentioned:

Rent/Home mortgage	+	\$30.00
Home maintenance	+	\$150.00
Transportation	+	\$155.00
Life insurance	+	\$11.00
Auto installment payment	+	<u>\$80.00</u>
		\$426.00

Debtors desire to increase their general household expenses more than one-third (1/3) is unreasonable. According to the Bureau of Labor Statistics, the Consumer Price Index ("CPI") increased 2.8% in 2007; 3.8% in 2008, and -0.4% in 2009. *See* Exhibit A (taken from http://www.bls.gov/cpi/cpi_dr.htm#2010, December 16, 2010). Using these figures as a baseline, and allowing a generous 2% increase for 2010, would result in an across-the-board increase of \$100.00 based on the CPI. The court accepts \$1,250.00 for

⁵ This is based on inappropriate electric bills, but the court can only work with what it has.

household expenses as a more reasonable amount. An approximate breakdown of this figure is:

Groceries/food	\$650.00 (\$150.00 per week)
Clothing	\$200.00 (\$50.00 per month per person)
Laundry/dry cleaning	\$ 50.00
Recreation	\$240.00
School lunches	\$ 60.00
Children's expenses	<u>\$ 50.00</u>
	\$1,250.00

An amended Schedule J showing a budget based on the findings above is attached as Exhibit B. As a result of the income and expense findings, the court concludes that Debtors' disposable income is \$1,215.00. Plan payments should immediately increase.

An appropriate order will be entered.

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SERVICE LIST

John H Hornbrook
1400 N Market Ave
Canton, OH 44714-2608

Toby L Rosen
400 W Tuscarawas St
Charter One Bank Bldg
4th Floor
Canton, OH 44702

Table 1A. Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, by expenditure category and commodity and service group

(1982-84=100, unless otherwise noted)

Item and group	Annual average 2007	Annual average 2008	Percent change from 2007 to 2008
Expenditure category			
All items	207.342	215.303	3.8
All items (1967=100)	621.106	644.951	-
Food and beverages	203.300	214.225	5.4
Food	202.916	214.106	5.5
Food at home	201.245	214.125	6.4
Cereals and bakery products	222.107	244.853	10.2
Meats, poultry, fish, and eggs	195.616	204.653	4.6
Dairy and related products	194.770	210.396	8.0
Fruits and vegetables	262.628	278.932	6.2
Nonalcoholic beverages and beverage materials	153.432	160.045	4.3
Other food at home	173.275	184.166	6.3
Sugar and sweets	176.772	186.577	5.5
Fats and oils	172.921	196.751	13.8
Other foods	188.244	198.103	5.2
Other miscellaneous foods ¹	115.105	119.924	4.2
Food away from home	206.659	215.769	4.4
Other food away from home ¹	144.068	150.640	4.6
Alcoholic beverages	207.026	214.484	3.6
Housing	209.586	216.264	3.2
Shelter	240.611	246.666	2.5
Rent of primary residence	234.679	243.271	3.7
Lodging away from home ¹	142.813	143.664	.6
Owners' equivalent rent of primary residence ²	246.235	252.426	2.5
Tenants' and household insurance ¹	117.004	118.843	1.6
Fuels and utilities	200.632	220.018	9.7
Household energy	181.744	200.808	10.5
Fuel oil and other fuels	251.453	334.405	33.0
Gas (piped) and electricity	186.262	202.212	8.6
Water and sewer and trash collection services ¹	143.706	152.117	5.9
Household furnishings and operations	126.875	127.800	.7
Household operations ¹	140.621	147.542	4.9
Apparel	118.998	118.907	-.1
Men's and boys' apparel	112.368	113.032	.6
Women's and girls' apparel	110.296	107.460	-2.6
Infants' and toddlers' apparel	113.948	113.762	-.2
Footwear	122.374	124.157	1.5
Transportation	184.682	195.549	5.9
Private transportation	180.778	191.039	5.7
New and used motor vehicles ¹	94.303	93.291	-1.1
New vehicles	136.254	134.194	-1.5
Used cars and trucks	135.747	133.951	-1.3
Motor fuel	239.070	279.652	17.0
Gasoline (all types)	237.959	277.457	16.6
Motor vehicle parts and equipment	121.583	128.747	5.9
Motor vehicle maintenance and repair	222.963	233.859	4.9
Public transportation	230.002	250.549	8.9
Medical care	351.054	364.065	3.7
Medical care commodities	289.999	296.045	2.1
Medical care services	369.302	384.943	4.2
Professional services	300.792	310.968	3.4
Hospital and related services	498.922	533.953	7.0

See footnotes at end of table.

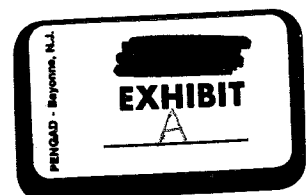


Table 1A. Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, by expenditure category and commodity and service group

(1982-84=100, unless otherwise noted)

Item and group	Annual average 2006	Annual average 2007	Percent change from 2006 to 2007
Expenditure category			
All items	201.6	207.342	2.8
All items (1967=100)	603.9	621.106	-
Food and beverages	195.7	203.300	3.9
Food	195.2	202.916	4.0
Food at home	193.1	201.245	4.2
Cereals and bakery products	212.8	222.107	4.4
Meats, poultry, fish, and eggs	186.6	195.616	4.8
Dairy and related products	181.4	194.770	7.4
Fruits and vegetables	252.9	262.628	3.8
Nonalcoholic beverages and beverage materials	147.4	153.432	4.1
Other food at home	169.6	173.275	2.2
Sugar and sweets	171.5	176.772	3.1
Fats and oils	168.0	172.921	2.9
Other foods	185.0	188.244	1.8
Other miscellaneous foods ¹	113.9	115.105	1.1
Food away from home	199.4	206.659	3.6
Other food away from home ¹	136.6	144.068	5.5
Alcoholic beverages	200.7	207.026	3.2
Housing	203.2	209.586	3.1
Shelter	232.1	240.611	3.7
Rent of primary residence	225.1	234.679	4.3
Lodging away from home ¹	136.0	142.813	5.0
Owners' equivalent rent of primary residence ²	238.2	246.235	3.4
Tenants' and household insurance ¹	116.5	117.004	.4
Fuels and utilities	194.7	200.632	3.0
Household energy	177.1	181.744	2.6
Fuel oil and other fuels	234.9	251.453	7.0
Gas (piped) and electricity	182.1	186.262	2.3
Water and sewer and trash collection services ¹	136.8	143.706	5.0
Household furnishings and operations	127.0	126.875	-.1
Household operations ¹	136.6	140.621	2.9
Apparel	119.5	118.998	-.4
Men's and boys' apparel	114.1	112.368	-1.5
Women's and girls' apparel	110.7	110.296	-.4
Infants' and toddlers' apparel	116.5	113.948	-2.2
Footwear	123.5	122.374	-.9
Transportation	180.9	184.682	2.1
Private transportation	177.0	180.778	2.1
New and used motor vehicles ¹	95.6	94.303	-1.4
New vehicles	137.6	136.254	-1.0
Used cars and trucks	140.0	135.747	-3.0
Motor fuel	221.0	239.070	8.2
Gasoline (all types)	219.9	237.959	8.2
Motor vehicle parts and equipment	117.3	121.583	3.7
Motor vehicle maintenance and repair	215.6	222.963	3.4
Public transportation	226.6	230.002	1.5
Medical care	336.2	351.054	4.4
Medical care commodities	285.9	289.999	1.4
Medical care services	350.6	369.302	5.3
Professional services	289.3	300.792	4.0
Hospital and related services	468.1	498.922	6.6

See footnotes at end of table.

Table 1A. Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, by expenditure category and commodity and service group

(1982-84=100, unless otherwise noted)

Item and group	Annual average 2008	Annual average 2009	Percent change from 2008 to 2009
Expenditure category			
All items	215.303	214.537	-0.4
All items (1967=100)	644.951	642.658	-
Food and beverages	214.225	218.249	1.9
Food	214.106	217.955	1.8
Food at home	214.125	215.124	.5
Cereals and bakery products	244.853	252.567	3.2
Meats, poultry, fish, and eggs	204.653	203.805	-.4
Dairy and related products	210.396	197.013	-6.4
Fruits and vegetables	278.932	272.945	-2.1
Nonalcoholic beverages and beverage materials	160.045	163.034	1.9
Other food at home	184.166	191.220	3.8
Sugar and sweets	186.577	196.933	5.6
Fats and oils	196.751	201.224	2.3
Other foods	198.103	205.497	3.7
Other miscellaneous foods ¹	119.924	122.393	2.1
Food away from home	215.769	223.272	3.5
Other food away from home ¹	150.640	155.852	3.5
Alcoholic beverages	214.484	220.751	2.9
Housing	216.264	217.057	.4
Shelter	246.666	249.354	1.1
Rent of primary residence	243.271	248.812	2.3
Lodging away from home ¹	143.664	134.243	-6.6
Owners' equivalent rent of primary residence ^{2 3}	252.426	256.610	1.7
Tenants' and household insurance ¹	118.843	121.487	2.2
Fuels and utilities	220.018	210.696	-4.2
Household energy	200.808	188.113	-6.3
Fuel oil and other fuels	334.405	239.778	-28.3
Gas (piped) and electricity	202.212	193.563	-4.3
Water and sewer and trash collection services ¹	152.117	161.145	5.9
Household furnishings and operations	127.800	128.701	.7
Household operations ¹	147.542	150.265	1.8
Apparel	118.907	120.078	1.0
Men's and boys' apparel	113.032	113.628	.5
Women's and girls' apparel	107.460	108.091	.6
Infants' and toddlers' apparel	113.762	114.489	.6
Footwear	124.157	126.854	2.2
Transportation	195.549	179.252	-8.3
Private transportation	191.039	174.762	-8.5
New and used motor vehicles ¹	93.291	93.486	.2
New vehicles	134.194	135.623	1.1
Used cars and trucks	133.951	126.973	-5.2
Motor fuel	279.652	201.978	-27.8
Gasoline (all types)	277.457	201.555	-27.4
Motor vehicle parts and equipment	128.747	134.050	4.1
Motor vehicle maintenance and repair	233.859	243.337	4.1
Public transportation	250.549	236.348	-5.7
Medical care	364.065	375.613	3.2
Medical care commodities	296.045	305.108	3.1
Medical care services	384.943	397.299	3.2
Professional services	310.968	319.372	2.7
Hospital and related services	533.953	567.879	6.4

See footnotes at end of table.

